

	OAH No. 12-2500-17084-2 PUC No. P-442, 5798, 5340, 5826, 5025, 5643, 443, 5323, 5668, 4661/C-04-235
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STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint of the Minnesota Department of Commerce for Commission Action Against AT&T Regarding Negotiated Contracts for Switched Access Services	<b>ORDER ON MOTION BY AT&amp;T TO ALLOW ADDITIONAL EVIDENCE AND ON DEPARTMENT'S CHALLENGE TO AT&amp;T'S TRADE SECRET DESIGNATIONS OF CERTAIN EXHIBITS</b>
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This matter is before Administrative Law Judge Steve M. Mihalchick on AT&T's motion to submit further evidence regarding hearing Exhibit 8 and the Department's motion that portions of several exhibits designated as trade secret by AT&T be considered public data. Argument on the motions was held on December 13, 2006. The parties other than Verizon submitted additional written material, the last of which was received on January 8, 2007.

Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite 1400, Saint Paul, MN 55101, appeared on behalf of the Department of Commerce (Department). Rebecca B. DeCook, Moye White LLP, 16 Market Square, 6th Floor, 1400 16th St, Denver, CO 80202-1486, and Letty S.D. Friesen, AT&T Law Department, 2535 E. 40th Ave, Rm B1223, Denver, CO 80205 appeared on behalf of AT&T. Lesley Lehr, Gray Plant Mooty, 500 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-3796, on behalf of MCI Communications Services, Inc., dba Verizon Business Services (MCI). MCI appeared as a non-party participant. Larry D. Espel, Greene Espel, 200 South Sixth St, Suite 1200, Minneapolis, MN 55402-1415 appeared on behalf of Qwest.

Based on the memoranda and file herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge issues the following:

**ORDER**

1. AT&T's proposed replacements for Exhibit 7, AT&T's revised response to Department IR 54, are **RECEIVED**. The public document version is received as Exhibit 7A and the nonpublic document version is received as Exhibit

7B. There is no objection to AT&T's trade secret markings of the exhibit. Existing Exhibit 7 shall be removed from the record.

2. The Department's request to withdraw Exhibit 8, the 1998 Switched Access Services Agreement, is **GRANTED**. The exhibit shall be removed from the record.

3. Testimony and other evidence remaining in the record regarding Exhibit 8 shall not be used in this matter to determine liability for or count penalty days for any time period prior to the effective date of the 2004 Switched Access Service Agreement at issue in this matter. Such evidence may, however, be used for other purposes such as impeachment.

4. AT&T's request that it be allowed to submitted additional evidence regarding Exhibit 8 is **DENIED**.

5. This matter is ready for briefing. The parties shall submit simultaneous briefs by March 20, 2007, and simultaneous replies by March 30, 2007.

6. Exhibit 8 having been withdrawn, it is not necessary to address its subsequent trade secret marking by AT&T.

7. AT&T's proposed replacements for Exhibits 12, 13, and 16 through 26 are **RECEIVED**. The public document versions are received as Exhibits 12A, 13A, and 16A through 26A and the nonpublic document versions are received as Exhibits 12B, 13B, and 16B through 26B. Existing Exhibits 12, 13, and 16 through 26 shall be removed from the record.

8. The Department and Qwest may comment in their briefs on AT&T's identification of trade secret information in creating the public and non-public versions of Exhibits 12, 13, and 16 through 26 and the justifications presented by AT&T and MCI in their January 2, 2007, submissions. They may also comment on whether any portion of the MCI-provided copies of the 2004 bi-lateral switched access contracts attached to the Amended Verified Complaint and to the Motion for Summary Disposition should be afforded trade secret protection. AT&T and MCI may respond to those comments in their reply briefs.

9. Pending further recommendation of the Administrative Law Judge and order of the Commission, Exhibits 12B, 13B, and 16B through 26B and the portions of the transcript designated trade secret by AT&T shall be maintained and used as trade secret data under the Minnesota Government Data Practices Act and the Protective Agreement.

10. AT&T does not claim that the part of the hearing transcript conducted in "closed session" contains trade secret data, except as specifically designated. Therefore, subject to the foregoing paragraph, the designation of Tr. v. 2, p. 63, l. 22 through p. 89, l. 8, as being in a closed session shall be

disregarded and that material shall be considered public except where specifically designated as trade secret at pages 75-76.

Dated: February 20, 2007

/s/ Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

## **MEMORANDUM**

### **Background**

In a Recommendation on Motion for Summary Disposition issued by the Administrative Law Judge on June 26, 2006, it was determined that, among other things, AT&T had violated several statutes by failing to file an agreement it had with MCI<sup>1</sup>. Under that agreement, AT&T (in its CLEC capacity) gave MCI (in its IXC capacity) a discount from AT&T's filed tariff rates for intrastate switched access services. A hearing in this matter was held on November 14 and 15, 2006, in St. Paul, Minnesota, to receive evidence regarding the penalty to be imposed upon AT&T for the violations. At the close of the hearing, AT&T was allowed additional time to propose a process for responding to Exhibit 8 and to clarify the trade secret status of several exhibits.

### **The Exhibit 8 Issue**

The Department initiated this matter in 2004 by filing a Complaint and Request for Commission Action regarding several unfiled agreements under which several CLECs, including MCI, agreed to provide AT&T (as an IXC) with switched access services at rates that were different from the CLECs' tariffed rates.

In response to Department Information Request No. 30, on October 19, 2004, MCI provided two Switched Access Service Agreements it had with AT&T that neither MCI nor AT&T had ever previously filed with or disclosed to the Department. The two unfiled agreements were effective January 27, 2004, and were national bi-lateral switched access contracts, that is, they were substantively identical except that the names of the parties were exchanged. In the "First Unfiled Agreement," AT&T and MCI agreed that AT&T would purchase intrastate switched access services from MCI for AT&T's long distance IXC

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<sup>1</sup> MCI had several subsidiaries that were acquired by WorldCom. Subsequently, on January 6, 2006, MCI, Inc., and its subsidiaries were acquired by Verizon Communications, Inc. MCI Communications, Inc., now does business as Verizon Business Services. See, Response of Verizon Business Services to motion for summary disposition, fn. 1.

operations at prices lower than MCI's filed tariff rates. Under the terms of the "Second Unfiled Agreement," they agreed that MCI would purchase intrastate switched access services from AT&T for MCI's long distance IXC operations at prices lower than AT&T's filed tariff rates.

In April 2005, MCI and the Department signed a Stipulation and Agreement resolving the complaint against MCI. Among other things, MCI agreed to charge and pay the tariffed rates in Minnesota. On April 25, 2005, the Department filed "Additional Comments" with the Commission updating it on recent dealings with the carriers. It attached copies of the First and Second Unfiled Agreements.<sup>2</sup> Over the last two years, all the other carriers involved, including AT&T in its IXC capacity and except AT&T in its CLEC capacity, have settled with the Department, and the Stipulations and Agreements have been approved by the Commission.<sup>3</sup>

On October 27, 2005, the Department filed an Amended Verified Complaint that made allegations against only AT&T (as a CLEC) regarding violations related to the Second Unfiled Agreement with MCI as IXC. On January 24, 2006, the Commission issued its Notice and Order for Hearing in this matter in docket number C-04-235. The Notice and Order for Hearing referred to the allegations made against AT&T in the Amended Verified Complaint. Thus, the Second Unfiled Agreement, the 2004 Switched Access Service Agreement with AT&T as the CLEC (the 2004 SASA), is the only unfiled agreement at issue in this matter.

At the hearing on November 14, 2006, Department witness Greg Doyle testified at the beginning of his testimony that he had learned through discovery from AT&T the previous week of a National Service Agreement dating to 1996 (the 1996 NSA) and a Switched Access Service Agreement dating to 1998 (the 1998 SASA) that might have implications in this matter if they indicated that AT&T had been charging MCI rates other than tariffed rates. He felt that these agreements could affect the number of days of violation and might demonstrate that the 2004 SASA did not have its origins in the MCI bankruptcy, as AT&T claimed.<sup>4</sup> Later that day, MCI provided a copy of the 1998 SASA to the Department. The Department then introduced the 1998 SASA as Exhibit 8 at the hearing.<sup>5</sup> The document was received, but because it raised new liability and penalty issues, AT&T was offered the opportunity to propose a procedure that would allow it to put in evidence regarding the 1998 SASA at an additional hearing date or in some other manner.

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<sup>2</sup> The Additional Comments are attached to the Department's Motion for Summary Disposition of March 31, 2006, as Attachment 1. The agreements are Sub-attachments B and C thereto.

<sup>3</sup> Some of those matters have been addressed in this docket and some in Docket No. P-442, 5243, 5934, 5681, 6287, 5656, 5936, 6144, 5542, 5981, 5720/C-05-1282

<sup>4</sup> Tr. v. 1, 16.

<sup>5</sup> AT&T claims that it provided the 1998 SASA to the Department at some earlier point, but there is no substantial evidence of that.

On December 4, 2006, AT&T sent an email to the parties. It requested that AT&T be allowed to provide direct testimony on the 1998 SASA, Ex. 8, because Mr. Doyle had stated that it might form a basis for additional penalties, that it was of little impact because AT&T had little or no presence in Minnesota during its term and extensions, and because no violation had been alleged or determined based upon the 1998 SASA. AT&T requested that it be allowed to file prefiled direct testimony on the issue, that the Department and Qwest file rebuttal testimony, that AT&T file surrebuttal, and that AT&T witnesses then be cross-examined.

On December 11, 2006, the Department filed its reply. It argued that if AT&T were allowed any additional testimony, it should be limited to testimony regarding the existence of and terms of the 1998 SASA, and not be allowed to address its other issues because they had already been fully litigated. It noted that AT&T had a full opportunity to cross-examine Mr. Doyle and that its witnesses had testified after Mr. Doyle and could have addressed the 1998 SASA. Moreover, in spite of two years of requests, the fact that there was a 1998 SASA that governed the terms between AT&T and MCI before 2004 had been revealed to the Department only a week before the hearing and a copy had not been provided until Mr. Doyle was already on the stand. Thus, the Department argued, there was only self-inflicted surprise to AT&T because of its efforts to conceal the document.

Oral argument was held on December 13, 2006, and the parties were requested to submit additional written argument by January 2, 2007. All parties did so, as did MCI as a non-party participant.<sup>6</sup> An additional reply was filed by the Department on January 8, 2007.

AT&T has argued that the Department should not be allowed to seek additional penalties against AT&T based upon the 1998 SASA that was not a part of the Complaint, pre-filed testimony, or the Recommendation for Summary Disposition. In its January 2, 2007, submission, the Department requested that it be allowed to withdraw Exhibit 8. It stated that its primary purpose in introducing Exhibit 8 was to impeach what it viewed as claims of AT&T witnesses that the 2004 SASA arose out of MCI's bankruptcy negotiations. As to Mr. Doyle's comment that the 1998 SASA may justify penalties back to 1998, the Department notes that it has not sought such penalties in this matter, but could do so in a separate complaint if it chose to do so in the future.

The violations alleged here involve the 2004 SASA and nothing else. There may be issues involving the 1998 SASA that could be addressed in another case, but the Department is not seeking to address them here. Allowing the Department to withdraw Exhibit 8 is, therefore, appropriate and should remove AT&T's concern that the 1998 SASA would be used to justify additional

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<sup>6</sup> Counsel for MCI attended parts of the November 2006 hearing, but did not actively participate. She did participate in the December 13, 2006, oral argument.

penalties for the time period before the 2004 SASA became effective. To assure that protection, no other record evidence regarding pre-2004 contracts may be used to calculate penalty days in this matter. It may, however be used for purposes such as impeachment.

Withdrawal of Exhibit 8 makes it unnecessary for AT&T to respond to it. As to other evidence regarding prior contracts, AT&T has presented its evidence as to the development of the 2004 SASA. It also had ample opportunity to put in its own testimony regarding the relevance of any prior contracts during the hearing and to rehabilitate any of its witnesses it felt had been impeached. And it may certainly argue its interpretation of all the evidence in its brief. There is no prejudice to AT&T.

### **Trade Secret Issues**

On July 16, 2004, AT&T filed a proposed Protective Agreement with the Commission that had been agreed to by all the carriers in this matter at the time except one. On July 22, 2004, the Commission issued its Order Approving Protective Agreement.<sup>7</sup> The Protective Agreement is very similar to those used in other telephone matters before the Commission. The purpose of the Protective Agreement is to allow appropriate discovery while protecting the confidentiality of documents exchanged among non-agency parties throughout the Commission proceedings. The Department is not a party to the Protective Agreement, and the Protective Agreement does not apply to it. Instead, as the Protective Agreement states at Paragraph 7, the Commission, Department, Office of Administrative Hearings, and other state agencies must treat trade secret data they receive in accordance with the Minnesota Government Data Practices Act and the State Archives Law. Those laws provide for the protection of trade secret and other not public data while in the hands of the agencies. The Protective Agreement provides for a challenge to a trade secret or confidential information designation by appropriate pleading, upon ten days notice, to be resolved by the Commission. The Protective Agreement also provides that no party waives its right to confidentiality by inadvertent disclosure.

The Protective Agreement requires all material claimed to be confidential or trade secret to be marked with the designation **“TRADE SECRET NOT FOR PUBLIC DISCLOSURE”** or **“CONFIDENTIAL INFORMATION—SUBJECT TO PROTECTIVE AGREEMENT”** or words of similar import. It considers materials marked in accordance with the “Commission’s” Revised Procedures for Handling Trade Secret and Privileged Data to be appropriately marked for purposes of the Protective Agreement. More accurately, those are the Commission’s and Department’s Revised Procedures (the Revised Procedures). The reference to them is appropriate because the Revised Procedures require more extensive marking for materials provided to the Commission or the Department than does the Protective Agreement. The Revised Procedures incorporate Minn. R.

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<sup>7</sup> AT&T submission of January 2, 2007, Ex. B.

7829.0500, subp. 4, which requires that the first or cover page of a document containing protected information be clearly marked in bold print, "**TRADE SECRET INFORMATION -- NOT FOR PUBLIC DISCLOSURE**" or with words of similar import. Further, it requires every page on which protected information appears to be similarly marked and that the protected information itself be "underlined, placed in brackets, or otherwise clearly identified as the information which is to be protected from disclosure." Finally, the Revised Procedures require that all materials identified as trade secret or privileged be accompanied by a statement justifying why the state agencies should treat the data as protected data including an explanation of how the data either meets the definition of a trade secret under Minn. Stat. § 13.37 or is privileged under a rule of privilege recognized by law.

The copy of the 2004 SASA provided to the Department by MCI in 2004 contains language indicating that AT&T and MCI considered the entire document to be confidential, proprietary, and trade secret. It so states within the body of the agreement. Each page is marked at the very bottom, "*MCI and CLEC Proprietary and Confidential.*"<sup>8</sup> Above that, the following language appears, "**TRADE SECRET – NOT FOR PUBLIC DISCLOSURE.**" This marking was added by MCI prior to providing the copies to Department. Counsel for MCI stated that the purpose was to maintain the confidentiality of the MCI copy of the 2004 SASA at that time and that the confidentiality of the document has never been waived by MCI.<sup>9</sup> The marking complied with the Protective Agreement, but not with the Revised Procedures, which control because the material was provided to the Department. MCI failed to identify the specific language claimed to be trade secret and did not include a statement justifying trade secret handling by the Department or Commission. It could be argued, as Qwest and the Department have to some extent, that the documents were provided as public documents by MCI. However, the Department treated them as not public recognizing there was some claim to that effect. For the same reason, the Administrative Law Judge allowed AT&T to file appropriately marked copies of the exhibits in the record that it claimed contained trade secrets.

On May 3, 2006, counsel for Qwest obtained a copy of the 2004 SASA from AT&T in discovery.<sup>10</sup> While the bodies of the MCI copy and AT&T copy are identical, the surrounding markings differ in three non-substantive ways. The MCI copy is stamped "ORIGINAL" on the first page, the AT&T copy is not. The signatures and handwritten dates are slightly different, indicating that each signor signed at least two originals. Third, the AT&T copy does not bear a "**TRADE SECRET – NOT FOR PUBLIC DISCLOSURE**" statement like the one that MCI had applied to the copy it provided to the Department. While AT&T did not apply that statement to the copy it provided to counsel for Qwest, it raised the issue of

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<sup>8</sup> The First Unfiled Agreement has the same language, except that "MCI" is replaced with "AT&T." *Id.*

<sup>9</sup> Hearing Transcript (Tr.) v. 2, 42-43.

<sup>10</sup> Attachment to email from Larry D. Espel, Dec. 13, 2006, 3:08 p.m.

confidentiality generally and questioned whether Qwest representatives had signed the required Ex. A to the Protective Agreement. Counsel for Qwest subsequently signed an Ex. A on May 5, 2006, which was filed on May 15, 2006.

At the hearing on November 14, 2006, counsel for Qwest offered the AT&T copy of 2004 SASA for purposes of questioning an AT&T witness. It was marked as Exhibit 13 and was received. It was considered temporarily trade secret and nonpublic subject to further argument because AT&T had not had yet marked it as required by the Revised Procedures. The Department had not introduced its MCI copy of the 2004 SASA into the hearing record, but indicated that it had intended to offer the MCI copy that had been attached to the Motion for Summary Disposition.<sup>11</sup> It never did so.

It was not until its January 2, 2007, submission, that AT&T filed public and non-public versions of hearing Exhibits 12, 13, and 16 through 26. AT&T marked them in accordance with the Revised Procedures. Separate justification statements were not included with each exhibit, but AT&T's January 2, 2007, brief addressed its justifications at length. MCI never has submitted properly marked copies of the two unfiled agreements it provided to the Department, but its January 2, 2007, submission joins many of AT&T's arguments on the trade secret status of the exhibits in question. The Department and Qwest anticipated that they would have some of the trade secret designations made by AT&T and MCI, but have not had the opportunity to respond to the January 2, 2007, AT&T filing.

Because the exhibits here are data in the possession of the Department, Administrative Law Judge, and Commission, their handling is controlled by the Minnesota Government Data Practices Act, Minn. Stat. Chap. 13. Under Minn. Stat. § 13.37, subd. 1(b), "Trade secret information" means government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. As the basis for their arguments, AT&T and MCI cite the definition of a trade secret and cases under the (Minnesota) Uniform Trade Secrets Act, Minn. Stat. Chap. 325C. That Act addresses torts such as misappropriation and has little, if any, application here. Consistent with that view, the Protective Agreement refers to the definition of trade secret in Minn. Stat. § 13.37, not Minn. Stat. § 325C.01, subd. 5. Nonetheless, the definition of trade secret information under Minn. Stat. § 13.37, subd. 1(b), is essentially the same as the definition of a trade secret under Minn. Stat. § 325C.01, subd. 5, so the cited cases may be instructive here.

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<sup>11</sup> Tr. v. 1, 176-180.



Exhibits 12, 13 and 16-26 all were originally produced by AT&T to Qwest during discovery. AT&T claims they were properly labeled as confidential/trade secret in accordance with the Protective Agreement.<sup>12</sup> That is mostly correct. Exhibits 12 and 18-26 bore proper labels. Exhibit 13, contained the legend, “*MC/ and CLEC Proprietary and Confidential*,” at the bottom of each page, which arguably complies with the Protective Agreement; it certainly provides notice that “CLEC” (AT&T) was claiming “confidentiality,” but not necessarily “trade secret” status. Exhibits 16 and 17 bore no such markings at all. Whatever the quality of the markings originally, AT&T has been allowed to submit replacement exhibits marked in accordance with the Revised Procedures.

AT&T argues that Qwest improperly provided copies of the documents to the Department in violation of Paragraph 1(b) of the Protective Agreement. Qwest did provide copies to the Department for reasons that were not made entirely clear. It may have been a matter of convenience for the Department.

Paragraph 1(b) says that information provided to a party shall be given solely to the party’s counsel and experts or witnesses who sign an Exhibit A. It goes on to say that the information shall not be used or disclosed except for purposes of this proceeding. The first sentence requires the receiving party’s counsel and witnesses to have signed Exhibit A. There is no indication that Exhibit A was not signed by all Qwest counsel, at least after the fact. It had no witnesses. Qwest disclosed the documents to counsel for the Department. That was clearly “for purposes of this proceeding.” Confidential information disclosed to the Department and counsel is adequately protected from improper disclosure. There was no violation of Paragraph 1(b) of the Protective Agreement by Qwest. Even if there had been, there is no prejudice to AT&T. AT&T did not mark the documents in accordance with the Revised Procedures before it gave them to Qwest, although it easily could have done so as the Protective Agreement, that AT&T drafted, notes to be an option. AT&T seems to be arguing that it did not know the documents could ultimately become part of the record in this proceeding before an ALJ and the Commission, so it only marked them, if at all, in accordance with the Protective Agreement. That argument is plainly without merit. And again, AT&T was given the opportunity to properly claim trade secret status after the fact.

AT&T also objects to Qwest’s introduction into the record of Exhibit 13, the AT&T copy of the 2004 SASA, because Qwest failed to follow the requirements of Paragraph 5 of the Protective Agreement. That paragraph prohibits a receiving party from using trade secret information in a hearing with prior notice to the disclosing party and conferring to determine whether procedures can be used to avoid disclosing confidential information to unauthorized persons. Qwest says it was not required to do so because it used the document for impeachment.

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<sup>12</sup> AT&T’s Motion and Brief at 13.

First, there was no danger of unauthorized disclosure, so there is no issue. Moreover, this argument goes to the admissibility of Exhibit 13, an issue that is not open at this time. It has been received. At the hearing, the only issue raised by AT&T was the trade secret status of Exhibit 13, which it is now being allowed to address.<sup>13</sup> Moreover, the MCI copy of the 2004 SASA that the Department attached to the Motion for Summary Disposition is part of the record and could have been substituted for Exhibit 13 if AT&T had raised this issue at the time. As noted elsewhere, Qwest only put in Exhibit 13 because the Department had not yet offered a copy of the 2004 SASA and Qwest reasonably needed the document to cross-examine an AT&T witness about the agreement. Ultimately, it really makes no difference because the MCI copy and the AT&T copy are substantively identical and now AT&T has provided public and non-public versions of Exhibit 13 for the hearing record. AT&T's claimed procedural violations lack substance.

Because the Department and Qwest have not yet had the opportunity to respond to AT&T's identification of trade secret information in Exhibits 12, 13, and 16-19, it is necessary to allow them to do so. Moreover, the Department and Qwest have not had an opportunity to respond to AT&T's justifications for its trade secret designations. Therefore, they will be allowed to do that as well.

S. M. M.

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<sup>13</sup> Tr. v.1, 177-179.